

INFORMATION

F O R

JAMES MURRAY of *Broughton*, Defender:

A G A I N S T

70

Sir THOMAS GORDON of *Earlston*, Pursuer.

THE Lords have had occasion, some years ago, to hear a good deal of debate upon the import of a Tailzie made by James Gordon of Carleton, in the year 1684, by which he disposed his estate to the heirs-male of his own body; whom failing, to John Gordon third son to Mr. William Gordon of Earlston; whom failing, to Nathaniel Gordon of Gordonstoun; whom failing, to James Maitland, and the heirs-male of their bodies, and their heirs-male *successive*; whom failing, to any other person he should name, and the heirs-male of their bodies; and failing such nomination, to return to his own heirs-male whatsoever; which all failing, to his nearest heirs and assignies whatsoever. By this Tailzie, the heirs were limited, not to sell, burden, alienate, or contract debts above the equal half of the value of the estate, under the usual resolute and irritant clauses annexed, in case of contravention.

April 15.
1684.

Upon

Dec. 12.
1702.

Upon the death of James Gordon without issue-male, John Gordon, the person first called, having predeceased him without issue, Nathaniel Gordon, the next substitute, entered into possession of the lands, and in 1702 expedite a general service as heir of tailzie to James Gordon, but without reciting the irritant and resolute clauses contained in the Tailzie. Nor was the Tailzie ever completed by infestment, or recorded in the register appointed by the act 1685.

June 14.
1725.

In 1725, Alexander Gordon, eldest son of Nathaniel, intermarried with Mrs. Grizel Gordon, daughter to his cousin Sir Alexander Gordon of Earlston, and sister to Sir Thomas the Pursuer: And, in the contract of marriage, his father Nathaniel resigned the estate of Carleton and his other lands, in favour of Alexander and his heirs-male to be procreate of that or any subsequent marriage; whom failing, in favour of Alexander, his heirs and assignies whatsoever.

June 21.
1749.

The said Nathaniel and Alexander Gordons having contracted considerable debts, which, with the growing annual-rents, exceeded the value of the lands, sundry adjudications were led by the Creditors, and a process of Ranking and Sale was brought; during the dependence of which, both Nathaniel and his son Alexander died, and Alexander Gordon, the son of the said Alexander, having been made a party to the process by a diligence founded upon the Tailzie made by James Gordon in 1684, insisted, that the estate could not be carried off by the debts of his father and grandfather, contrary to the limitations in the Tailzie: But the Lords found, 'That, by the conception of the Intail, the person contraveining forfeits for himself and his heirs; and therefore it is not competent to Alexander Gordon, the son of the alledged contraveiner, to object to the debts upon the estate of Carleton.'

Nov. 21.
1753.

But thereafter, upon compearance of William Gordon writer to the signet, second son of Sir Alexander Gordon of Earlston, who was admitted to plead the objection, as being one of the Tailzier's heirs-male whatsoever, the case was reported by the Lord Ordinary; and the Lords 'Repelled the objection founded upon the
' Act



‘act of parliament 1685, and found, that the heir in possession
‘might lawfully contract debts to the extent of the half of the value
‘of the estate.’

Some years after these proceedings, Sir Thomas Gordon of Earlstoun, elder brother of the said William Gordon, thought fit to raise a process of Declarator of Irritancy against the said Alexander Gordon his nephew, intending thereby to carry off one half of the estate, both from his nephew the apparent heir, and also from the creditors of his father and grandfather, the former possessors of the estate.

In this process, Sir Thomas, after reciting the Tailzie 1684, subsumes, ‘That John Gordon, the first substitute, having died unmarried, and James Mailand having also died without heirs, the
‘said Nathaniel Gordon, the next substitute, made up a title to the
‘tailzied estate, serving himself heir-male and of provision to the
‘said James Gordon the tailzier, but did not insert in the service and
‘retour any of the qualities of the Tailzie, or irritant and resolute
‘clauses therein contained. And the said Nathaniel Gordon did
‘further, in express contradiction to the said Tailzie, and to the
‘directions given by the act of parliament 1685, in the contract of
‘marriage execute betwixt Alexander Gordon the eldest son and
‘Mrs. Grizel Gordon, with his consent, as absolute proprietor
‘and unlimited fiar of the said estate, dispoise the same to the heirs
‘of the marriage; whom failing, to his own heirs and assignies;
‘and that on these titles, the said Nathaniel and Alexander Gordons,
‘and each of them, did contract debt far above half the value of
‘the tailzied estate, whereby the same was adjudged and evicted from
‘them and each of them, and a process of ranking and sale now
‘depends at the instance of their creditors, in order to have the estate
‘judicially sold for payment of their debts; so that the said Nathaniel and Alexander Gordons have, for themselves, on the fore-
‘said Tailzie and act of parliament 1685, forfeited their right and
‘interest to the said lands and estate, and are to be totally secluded
‘therefrom, in the same way as if they were naturally dead.’

And

And therefore concludes, ' That it should be found and declared, that the said Nathaniel and Alexander Gordons, and each of them and their heirs, have, in manner above-mentioned, forfeited their rights and titles to the tailzied lands of the said estate; and that the same does now fall, accresce, and belong to the Pursuer, as the next substitute, and that he has the sole just right and interest to the same, and may be served accordingly, heir-male and of tailzie, to the said James Gordon the tailzier, or any of the heirs called by the foresaid tailzie to the succession of the foresaid lands and estate, without any regard to the heirs of the said Nathaniel and Alexander Gordons, in the same way as if they were naturally dead: And that Alexander Gordon, eldest son and heir of the said Alexander, the forfeited person, should be found and declared, not only to have no right nor interest in the said estate, but also decerned to renounce and denude himself in favour of the Pursuer, and his heirs of the same *omni habili modo quo de jure*, in manner directed by the said bond of tailzie.' After which follows a conclusion of mails and duties against the tenants.

July 6.
1758.

In this Process, Alexander Gordon, the Defender, having objected to the Pursuer's title, the Lord Coalston Ordinary, Found, ' That before the action proceed, it is incumbent on the Pursuer to instruct his own title, by proving that he is the next substitute in the Tailzie after Nathaniel and Alexander Gordons; but found it competent to bring such proof in this Process without the necessity of a service.'

July 27.
1759.

After this, a Condescendence was given in by the Pursuer, of his propinquity to James Gordon the maker of the Tailzie; and on advising this Condescendence, without any objection made on the other side, the Lord Ordinary sustained the Pursuer's title and decerned.

Aug. 9.
1759.
April 15.
1728.

Soon after, comparance was made for James Murray of Broughton, who produced his interest, being a minute of sale entered into betwixt the deceased Alexander Murray his father, and the

the deceased Alexander Gordon, then younger of Carleton, whereby, for a price therein mentioned, Mr. Gordon became bound to dispoſe to Mr. Murray certain lands therein mentioned, being parts of the eſtate of Carleton, with abſolute warrandice. Upon which minute of ſale, and alſo for payment of ſeveral debts due by Nathaniel and Alexander Gordons, extending to the accumulate ſum of 433*l.* Sterling, the ſaid Alexander Murray did, in 1735, obtain a Decree of Adjudication of the lands of Carleton, againſt the ſaid Nathaniel and Alexander Gordons; and, in 1745, obtained a Charter under the Great Seal upon the ſaid Adjudication, on which he was infeſt.

July 2.
1735.
July 26.
1745.

Upon theſe titles Mr. Murray inſiſted that he was entitled to the property of the lands ſold by the minute of ſale, and to the other lands in payment of the debts adjudged for, and that his right could not be impeached upon the Tailzie 1684, which was a latent deed that did not appear in any record, in reſpect that his authors, Nathaniel and Alexander Gordons, poſſeſt the eſtate upon titles of property independent of the ſaid Tailzie.

The titles he condeſcended upon, were Adjudication at the inſtance of George Fullarton of Dreghorn, of the eſtate of Carleton, from the heirs-portioners of the deceased James Gordon, as lawfully charged to enter heir to him, in payment and ſatisfaction of the accumulate ſum of 2445*l.* 3*s.* 4*d.* Scots: And upon this Adjudication Dreghorn did, ſoon after, obtain a Charter under the Great Seal, upon which he was infeſt, and his infeſtment duely recorded.

Jan. 18.
1693.

1693.
March 15

Nov. 6.
Nov. 27.

Another Adjudication was led by John Martin writer in Edinburgh, againſt the heirs of Carleton, for the accumulate ſum of 808*l.* Scots.

Nov. 21.
1694.

And a third Adjudication was led by Mr. George Room, for the accumulate ſum of 4512*l.*

July 9.
1696.

The Adjudications at the inſtance of Fullarton of Dreghorn, and John Martin, were conveyed to Nathaniel Gordon in the year 1711; and the other, which was the largeſt, had been acquired by him in the name of John Gordon of Garrery, his Truſtee, in

March 23 1702. March 1702, before he made up any other title to the lands; and as these adjudications, with the annualrents falling due thereon, were equal to the value of the lands before they came into the person of Nathaniel Gordon, they fell naturally to be considered by third parties as his titles of possession: The Adjudication at Dreg-horn's instance was completed by Charter and Sasine in 1693; and this was the only infestment by which the estate was taken out of the *hereditas jacens* of James Gordon; for the Tailzie he made in 1684 continued latent, until it was founded on by Alexander Gordon the present apparent-heir, long after the Adjudications led by the creditors, in order to oppose the Process of Ranking and Sale brought at their instance. It was not published either by *infestment*, or *record*, so as any third party could be interpellated by it.

As the estate had been taken out of the *hereditas jacens* of James Gordon the last proprietor, by Adjudications equal to the value, and Charter, and Sasine under the Great Seal, as far back as 1693; and Nathaniel Gordon, who had all these titles in his person, had conveyed the estate as an unlimited fee to his son Alexander, in 1725, in his contract of marriage with Mrs. Grizel Gordon, sister to Sir Thomas Gordon the Pursuer; Mr. Murray of Broughton could have no scruple to lend him the sums for which he was afterwards obliged to adjudge the lands, nor to enter into a minute of sale with him, for a part thereof, in 1728: And therefore, it was contended, in behalf of the Defender, his heir, that the diligence led upon these titles behoved to exclude the Process of Irritancy brought against Alexander Gordon, by Sir Thomas his uncle, and Mr. Gordon his son, as the nearest heirs of Tailzie.

Jan. 29. 1761. The Lord Coalston, Ordinary, pronounced the following Interlocutor; *The Lord Ordinary having again considered this Representation, with the Answers, Replies, and Duplies, and other writings in Process, in respect, that Nathaniel Gordon, the heir of Tailzie in the estate of Carleton, did not insert the prohibitory, irritant and resolutive clauses in the body of his retour, and afterwards made up*
titles

titles to the said estate, by purchasing in Adjudications, led for payment of the Tailzier's debts, upon which charter and infeftment had followed, as far back as the year 1693; and in respect, that Alexander, the son of Nathaniel, did, in like manner, possess upon titles which contained no limitations; Finds, That the bond of Tailzie 1684, upon which no infeftment had followed, and which had never been recorded in the Register of Tailzies, cannot militate against creditors or purchasers, contracting bona fide with the said Nathaniel and Alexander Gordons; Repells the Objections to Bartonholm's Adjudications, and the conveyance thereof in favours of Nathaniel Gordon, in respect of the Answers; And, in respect it is not denied, that the bonds and other vouchers of debt, which are the grounds of Broughton's Adjudication, were granted for true, just, and onerous causes; and that the price mentioned in the minute of sale, between him and Alexander Gordon, was equal to the full value of the lands; FINDS, That the Adjudication led in implement thereof, and for payment of the debts due by Nathaniel and Alexander Gordons, is effectual against the Pursuers, the next heirs of Tailzie, as if no such Tailzie had been made.

Against this Interlocutor the Pursuer gave in a Representation; and the Lord Ordinary, upon considering the same, with Answers and Replies, made Avisandum to the Lords, and appointed parties to give in Informations. What follows is humbly offered in behalf of the said James Murray of Broughton.

In the *first* place, It will occur to your Lordships, That the ground upon which the Interlocutor is laid, is one of the most established principles in law, and indeed one that is essentially necessary for the security of purchasers and creditors, the great object of the law of this country; Namely, that whoever contracts with a person, who stands in the right of lands by unlimited titles, cannot be affected by any objection arising from an intail which does not appear upon record. This was the chief inconvenience which naturally occurred when the legislature first thought of introducing
Tailzies

Tailzies into this country, That third parties might be insnared by these new limitations proposed to be laid on property, if the utmost care was not taken, that they should be so clearly published as no mortal could be ignorant of them, who did not wilfully shut his eyes.

For this purpose, the law appointed *two publications*, one in the investiture of the lands, which consists of the *charter* and *safine* in which it required the irritant and resolute clauses to be fully ingrossed: And besides this, it also required a separate publication in a special *register* appointed by the *statute* to be kept for that purpose, in which every one might see at first view what estates were limited, so that they could safely trust the proprietor upon the faith of them, as free of any limitation, even without looking into their titles.

The law was not satisfied with one of those publications; both were made necessary. It declares, *That such tailzies shall only be allowed*, in which *the irritant and resolute clauses* are insert in the *charters* and *instruments of safine*, and the *original tailzie produced* before the Lords of Session, and the *provisions and conditions*, with the *irritant and resolute clauses*, recorded in manner therein mentioned; and it is only upon performance of both these conditions, that the statute declares the same to be *real and effectual against creditors, comprisers, adjudgers, and other singular successors*.

And accordingly the statute has always been so constructed, that one of these publications could not be sufficient against third parties without the other. In the case of the creditors of Callander of Dorater, the irritant and resolute clauses were fully ingrossed in the titles of the heir with whom the creditors contracted; but the Tailzie was not recorded in terms of the act 1685, and the Lords found, *That the Tailzie not being registrate in terms of the act of parliament, cannot prejudice the creditors*. And more lately, in the case of the creditors of Sir Kenneth M. Kenzie, who stood infest in the estate of Cromarty, under strict, prohibitive, irritant and resolute clauses, and contracted large debts, and after his death,
Sir

Dec 8. 1724.
Willison
contra Creditors of
Dorater.

Sir George his son and apparent heir contracted still more debts, upon all which the creditors insisted in diligences against the estate. The next heir of Tailzie objected to their diligence, as contrary to the *limitations* and *irritancies* which appeared from the *infestment*: But your Lordships found, *That the disposition and Tailzie of the lands and estate of Cromarty in 1695, whereupon infestment followed, having never been recorded in the register of Tailzies, as is directed by the statute 1685, can have no effect against the onerous creditors upon the said estate, who have affected the same by proper diligence*; and the decree was affirmed by the House of Lords; Jan 4. 1741. and in pursuance thereof, the estate was *judicially sold* by this Court, and the price applied in payment of debts due by Sir Kenneth M'Kenzie, who stood infest under the irritancies, and Sir George his son, who was apparent heir in the said infestment.

And as these restrictions laid upon proprietors will not be effectual against creditors, though they appear from the infestment, if they are not also insert in the particular register kept for that purpose, so, *e converso*, though they are insert in that register, yet, if the Tailzie is not completed by infestment, no creditor or third party is bound to notice it, if the heir has any separate title to the estate independent of the Tailzie. So it has been always adjudged by your Lordships, when such cases occurred, particularly in the Tailzie made by Patrick Oliphant of Bachilton, in December 1729, by which he himself was limited, as well as the after-heirs, from alienating or contracting debts beyond a certain extent. Though the Tailzie was duly recorded by your Lordships authority, in July 1730; yet, as no infestment was taken upon it, the creditors, who had contracted with him after his powers were exhausted, were found intitled, after his death, to have decrees, against the heir and the estate, for payment of their debts, because, though the Tailzie was on record, yet it was not completed by infestment, and when the law requires two publications to make Tailzies effectual against creditors and singular successors, the Court cannot exclude them from

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payment

July 17.
1740.

1751.
Creditors of
Patrick Oli-
phant of
Bachilton,
contra Lord
Oliphant.

payment of their debts, if both the conditions required are not duly observed.

And therefore, as no one of these publications can be effectual without the other, it must follow, *a fortiori*, that when a Tailzie is not published in either of the ways the law prescribes, it cannot have effect against creditors, but they may affect the estate upon any other title that was in the person of their debtor, in the same manner as if the Tailzie had not been made. If, indeed, the Debtor has no other title in his person, but a disposition of lands granted to him by the proprietor under restrictions, creditors may be affected by them, though not recorded, as was found by the House of Lords, in the case of the Tailzie of Westshiels, in respect there is no other title in such case, upon which the creditor could possibly contract; but whenever the debtor is possessed of another title, it cannot be doubted that creditors may safely contract upon the faith of the unlimited title that is in their debtor, and rest secure upon the statute, that no Tailzie, which does not appear in any of the records thereby prescribed, can have effect to their prejudice in the recovery of their debts.

To apply this to the present case; Every one who looked at the records behoved to see, that the only infestment by which the lands of Carleton were taken out of the *hereditas jacens* of James Gordon, was the infestment upon the charter under the Great Seal in 1693, proceeding upon the adjudication deduced at the instance of George Fullarton of Dreghorn; they must also have seen, upon looking into the records, that other adjudications were led for accumulated sums, which, with interests, did, in a few years, exceed the value of the lands. And they saw these diligences all conveyed to Nathaniel Gordon, the nearest heir-male of the last proprietor, who had deceased without issue. It is no uncommon thing for heirs to make up titles to their predecessors lands by expired diligences; especially when compleated by charter and infestment; and therefore creditors could have no reason to suspect that there was a
Tailzie

Tailzie lying lurking in the defunct's charter-chest, which did not appear from any infeftment nor in any record.

On the contrary, they had great reason to believe, that Nathaniel Gordon was not laid under any such fetters, when they saw that in his son Alexander's contract of marriage with Mrs. Grizel Gordon, sister to the Pursuer, who was himself a remoter heir-male of the defunct, he disposed the lands simply and absolutely to his son and his heirs-male of that or any other marriage; whom failing to his heirs and assignies whatsoever, without the least mention of any Tailzie, or of any limitation or restriction to which he could be subjected with respect to these lands.

June 24.
1725.

Upon these unlimited titles, the deceased Alexander Murray of Broughton, had no reason to scruple to lend money to the said Alexander Gordon, or to enter into a minute of sale with respect to a part of these lands, as he accordingly did in the year 1728; at least, if the Adjudications in Nathaniel's person were properly led, and the debts just and onerous, he had no reason to suspect danger from a latent Tailzie, lying in the charter-chest of the defunct, who had left his estate so burdened; and as the Adjudications, Charter and Infeftment were then near forty years old, and had never been subjected to any challenge, there was a natural prospect, that in a few years every objection against them would be removed by prescription.

In the present case, no objection lies either to the form of the Adjudications, or to the debts upon which they are led; tho' in the first debate before the Lord Ordinary, the Pursuers mentioned some trifling objections to one of the adjudications, which were repelled by his Lordship's interlocutor of 29th January 1761; yet in their Representation against that Interlocutor, they do not pray for a review of that part of it, but lay their plea upon other grounds; and therefore the adjudications are to be considered as irredeemable rights of property, in the same way as if Nathaniel Gordon had been infeft upon a disposition from the proprietor; and as, in that case, it would be impossible that his creditors, or singular successors, could

could be affected by a Tailzie, which appeared upon no record, the creditors and purchaser, who contracted with Nathaniel and his son, must be equally secure against it in the present case.

OBJECTI-
ON I.]

It was argued in behalf of the Pursuers, *imo*, ' That the defence ' pleaded for Mr. Murray was very unfavourable, as being found ' ded upon the expired legal of an adjudication led for no greater ' sum than 2445 *l.* 3 *s.* 4 *d.* *Scots*, upon which he would endeavour ' vour to evict the whole estate, both from the heirs and creditors ' of the defunct; That such adjudications for small sums are rarely ' sustained, even after an expired legal, to evict the absolute property ' of an estate; more especially, as in this case, there was no ' infestment taken after the legal expired, nor any decret of declarator ' of the expiry.' And it was also said, ' That Nathaniel Gordon had no sort of title to the estate of Carleton, but through the ' Tailzie made by the deceased James Gordon in 1684; That he ' was a remote relation, whom the defunct thought fit to prefer, ' in his succession, to the Pursuer and his father, who were his ' nearest heirs: And therefore, as Nathaniel and his son had contravened the conditions, under which they were called to the ' succession, they are justly excluded from it in favour of the Pursuer, ' whose right ought not to be disappointed, by claims raised ' on old deserted diligences acquired by remoter heirs, whom the ' defunct thought fit, by his Tailzie, to prefer to the Pursuers, ' the nearest heirs.'

ANSWER.

But if the adjudication 1693 is liable to no objection, it must be held in law a good title of property in the lands, after the legal is expired, and much more after the expiry of six times that period; and it must be held to be absolutely unexceptionable, as the objections made to it were repelled by Interlocutors in January 1761, and no application made to review that part of the Interlocutor. The law requires no new infestment to be taken after the legal, nor any declarator to be brought. A declarator *nihil novi juris tribuit*; but only declares the irredeemable right which had,

ipso

ipso jure, accrued to the adjudger by the expiry of the time limited for the reversion.

In this case the Defender's right does not singly lie upon the expiry of the legal of Dreghorn's adjudication; there are other two adjudications, which, when the accumulate sums are computed, with the interest due before they were acquired by Nathaniel Gordon, or had attained any possession, or could recover any payment, will be found to exceed the value of the lands. In such a case, tho' objections could be made to the form of the diligence; yet your Lordships would sustain the title. When there is any one adjudication formal enough to support an expired legal, and other diligences, tho' less formal, led upon just debts near to the value of the lands; your Lordships, in such cases, do always give the full effect to the *legal title*, when thus supported by *equity*; and refuse to open the expiry of the legal.

In a late Process at the instance of William Murray of Clardon, against Sir Alexander Murray and his creditors, the Pursuer insisted in an improbation of Sir Alexander's titles to the lands. He produced only two old apprisings, to which some objections were made that did not appear of great importance: But as the accumulate sums in both was no more than 1214*l. Scots*, about three years rent of the lands, a loud complaint was made, that the property of the lands should be carried off upon the legal for such a trifle: But it having been answered, That there were diligences led at the same time for debts to the value of the lands, tho' liable to informalities, your Lordships sustained the expiry of the legal of these small apprisings, and found them a sufficient title of property in Sir Alexander to exclude the Pursuer's action.

And as to what is said of Mr. Murray's intention to evict the estate from the other creditors of the deceased Nathaniel and Alexander Gordons, it is a plain misrepresentation of the case: His adjudication is led in implement of the minute of sale betwixt his father and Alexander Gordon; and, when it is sustained, the price must be paid to the creditors of Alexander and his father. It is

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also

1740.
Wm. Murray of Clardon, *contra* Sir Alexander Murray and his creditors.

also led for payment of debts due to his father by Alexander and Nathaniel, of which a part has since been received by the Defender, out of other funds belonging to them, conform to a Condescendence produced in Process; and he only claims the balance due to him, in concurrence with the other creditors; and as the total sum of their debts do far exceed the value of the lands, the plea now insisted on for Mr. Murray, upon the unlimited titles in the person of Nathaniel Gordon and his son Alexander, will be equally available to all the other creditors. So, the true state of the question is, Whether the value of the estate shall be applied towards payment of the debts due by Nathaniel and Alexander Gordons; or, if the half of it shall be evicted both from their creditors and from their descendants, and carried off by the Pursuers, upon this Declarator of Irritancy brought against the son of Alexander, on a fault committed not by himself, but by his father and grandfather.

The claim set up for the Pursuer, as the nearest heir to the deceased James Gordon the Tailzier, who would have succeeded by law to the estate if the Tailzie had not been made, is altogether without foundation. The relation appears to stand thus, by documents produced in Process, or referred to in the Record. John Gordon of Earlston had three sons, who had issue descended of their bodies, Alexander, William, and David; Alexander, the eldest, was great-grandfather to Sir Thomas Gordon the Pursuer; William, the second son, married the Heiress of Carleton, from whom that small estate descended to her son, James Gordon, the maker of the Tailzie 1684: David, the youngest son, was the father of Nathaniel, by whom, and his son Alexander, the debts were contracted, which the Pursuer wants to exclude by this Declarator of Irritancy. It is obvious, That Nathaniel, the nephew of William Gordon, by his youngest brother David, was the lineal heir-male both to William, and to his son James the Tailzier, preferably to any descendent of his eldest brother Alexander.

It

It was alledged for the Pursuer, 'That the lands of Carleton ought to be considered as conquest in the person of James, and consequently would have fallen to the heirs of his eldest uncle Alexander, and not of his youngest uncle David.' But this is evidently a mistake: The lands of Carleton, which descended to James by his mother, were undoubtedly heretage in his person, as much as if they had devolved to him by succession from his father; and, upon the decease of James, if he had made no settlement, behoved to devolve as heretage to the descendents of his father's younger brother David, and not to those of his elder brother Alexander.

And therefore, when James was to settle the succession by a Tailzie, upon his heirs-male, it is evident, That Nathaniel Gordon was his nearest heir-male, failing those of his own body; and that the Pursuer stands in the character of a *remoter heir-male*, as well by the *course of Law*, as by the *conception of the Tailzie*; and consequently, the aim of this Declarator of Irritancy is to evict the estate from the nearest heir-male, and his descendents, upon a contravention not incurred by himself, but by his father and grandfather, in settling the lands, in the contract of marriage 1725, without taking any notice of the Tailzie. Such penal irritancy insisted on by a *remoter heir*, to the *exclusion* of the nearest line, called both by *Law* and by the *Settlement*, surely deserves no favour; especially, when it is founded on a contract of marriage entered into with the Pursuer's own sister, and when it tends to the exclusion and forfeiture, not only of the nearest heir-at-law, but also of all the just and onerous creditors of his predecessors.

It was contended for the Pursuer, 'That Dreghorn's adjudication having been led in 1693, the legal did not expire till the 1703; and, in 1702, Nathaniel Gordon made up his title to the Tailzie by a general service: In consequence of which he was bound to prevent the expiry of the legal; and, tho' he afterwards acquired both this and Martin's adjudication in 1711, yet he could not take advantage of the legals which were allowed to expire through his own fault. On the contrary, the debts were

OBJECTI-
ON II.

‘ were extinguished *confusione*; and as he had no other but a personal
 ‘ right, every objection that was competent against him, must also
 ‘ be competent against his creditors, who had no reason to trust
 ‘ him upon the faith of the Record, when he was not infest; and
 ‘ consequently cannot plead the benefit of the expiry of the legal,
 ‘ more than he could have done.’

The clause in the Tailzie upon which the Pursuer pleaded,
 That the heirs were bound to redeem the adjudication within the
 legal, follows immediately after the nomination of heirs, and is
 in these words:

‘ They, and each of them that so enjoys the benefit of my said
 ‘ estate, noways breaking, altering, or innovating the foresaid
 ‘ Tailzie, and order of succession, nor selling, wadsetting, impig-
 ‘ norating, or anyways away-putting, either legally, or conventi-
 ‘ onally, my said lands and estate foresaid; nor granting any annu-
 ‘ alrents, or yearly duties forth thereof; nor contracting debts,
 ‘ nor doing any other deeds, directly or indirectly, above the e-
 ‘ qual half of the full value thereof, whereby the same may be
 ‘ apprised, adjudged, or otherways evicted in law from them, or
 ‘ any of them, in prejudice of the foresaid Tailzie; but prevent,
 ‘ *debito tempore*, all inconveniencies whatsoever, that anyways
 ‘ may occasion the eviction of my said estate, and extinction of the
 ‘ said Tailzie; wherein if they, or any of them, and their heirs
 ‘ and successors in time coming, shall anyways failzie or contra-
 ‘ veen in any point or article hereof; Then, and in these, or any
 ‘ of these cases, all such facts, acts, and deeds so done, or to be
 ‘ done, contrary, or prejudicial hereunto, are hereby declared, not
 ‘ only to be void and null in all time thereafter, without declara-
 ‘ tor to follow thereupon; but also the person, or persons, so
 ‘ contraveening, each of them, and their heirs foresaid, shall
 ‘ from thenceforth lose and amit, my lands and estate above said,
 ‘ and haill benefit thereof, and be totally seclused therefrom in
 ‘ all time thereafter.’

But

But, in answer to the above Objection, it will first occur to your Lordships, that this clause does not prove what the Pursuer would infer from it, not even against Nathaniel Gordon the Substitute in the Tailzie. The import of the clause is to prohibit the heirs under an irritancy, either to alter the succession, or to sell the lands, or contract debts, or do any other deed, above the half of the value, whereby they may be adjudged or evicted; and, if such deeds are done, they are bound to prevent the consequences of them from extending so far as to occasion the eviction of the estate, or extinction of the Tailzie. It is plain, the clause applies only to deeds done by the heirs of Tailzie to affect the estate, but has no view to any diligences done for the Tailzier's debts. This appears both from the antecedent and subsequent parts of the clauses above-recited. The *facts* and *deeds* done contrary thereto, are declared to be *void* and *null*: This cannot apply to the omission of purging an adjudication not led upon the heir's own deed; and the forfeiture of the descendents of the person contravening, would be equally improper to apply to such omission.

The Pursuer would have it supposed, that a year had intervened betwixt Nathaniel Gordon's service in 1702, and the expiry of the legal of Dreghorn's adjudication in 1703; but the fact is, that Nathaniel's general service bears date the 12th December 1702, and the legal of Dreghorn's adjudication expired upon the 18th January 1703; so it could not but be thought extremely rigorous to forfeit Nathaniel and all his descendents, because he did not redeem the adjudication in the short space that intervened betwixt these two periods. Had a Process of Irritancy been brought for so slender an omission, it is believed your Lordships would not have listened to it, unless it had been supported by an express *proviso* in the Tailzie: Here it is submitted, that the clause has no such import; that it refers only to diligences led for the heir's debts, where the eviction depends upon his own deed, to which only the *irritancy* of the *deed*, as well as the *forfeiture* of the contravenor's *descendents*, can with any propriety be applied.

E

And

And tho' the Tailzie in the clause, reserving power to the granter to sell or dispoſe the lands, contract debts and leave legacies, or to burden and diſpoſe of them in whole or in part, and to grant all writs and evidents requiſite, adds, That the heirs of Tailzie and proviſion ſucceeding and enjoying the benefit of his eſtate, ſhall by their acceptance thereof, be holden and obliged to pay, fulfill and obſerve the ſame in all points, and to relieve his heirs of Tailzie not enjoying the ſamen; yet this is no other than an exegetick clause, which is annexed to every reſerved faculty in order to make the debts effectual to the creditors; but it is never underſtood to preclude the heir either from being relieved of the debts out of the deſunct's moveables, or, failing theſe, from getting relief out of the tailzied eſtate. No man is preſumed to tailzie any further eſtate than what truly belongs to him; in ſo far as his lands are burdened with debts to that extent, it does not belong to him but to his creditors. Their diligence muſt ſubſiſt and affect the lands, and the heir cannot be bound to extinguiſh the ſame, unleſs the deſunct had left him other effects for that purpoſe, without which it is a thing by him altogether impreſtable, and will not be preſumed to be required of him.

And therefore, as this Tailzie contains no Irritancy upon the heir's right, in caſe of his not purging adjudications led for the Tailzier's debts, nor even in caſe of his poſſeſſing the eſtate upon any other title, the objection pleaded for the Purſuer fails in the firſt ſetting out. If a Tailzier contract debts, he ought to lay aſide funds for their payment, or oblige his heirs to redeem them under an irritancy, otherwiſe the law muſt take its courſe. He cannot reſtrain the effect of his creditors diligence; if they are obliged to deduce adjudications, and the legal expires, the property of the lands adjudged is by law veſted in the creditor, if the diligence is liable to no objection. So was the property veſted in Dreghorn in January 1703, to be communicated with any other creditor who had done equal diligence; and it is untenable to plead, that the debts of a Tailzier are extinguiſhed *confuſione*, by being acquired by an heir of Tailzie. This plea has always been over-ruled by your Lordſhips

Lordships as oft as the case occurred, particularly, in the late case of *Pittrichie*, where the debts were only personal; much less can it be pleaded in the case where the creditor had before acquired a property in the estate by his diligence, whether redeemable or irredeemable.

Dec. 1. 1757.
William Gordon
don *contra*
Major Maitland.

In the present case, the objection does not at all apply, as the right was become irredeemable in the person of Dreghorn many years before it was transmitted to Nathaniel Gordon; and as no obligation was laid upon Nathaniel by the Tailzie to purge or extinguish the diligence, so the right transmitted to Nathaniel, behoved to subsist in his person in the same manner it was before vested in the person of his author.

2do, et separatim, If it were supposed, that the above clause in the Tailzie, bound the heirs to purge adjudications led for the Tailzier's debts under an irritancy; yet this could have no effect against third parties until the irritancy was declared, much less when the Tailzie itself was not known. If a creditor had been to search all the records from one end to the other, he could not discover this Tailzie. It appeared from no infeftment, nor was it to be found in the register appointed by the statute; both which are declared necessary to make it effectual against creditors. The only infeftment that appeared on the lands, after the death of James Gordon, was Dreghorn's infeftment in 1693, which had carried the irredeemable property long before any of the creditors contracted with Nathaniel or Alexander Gordons. It had subsisted thirty-five years, as the only title to the lands upon record, before the deceased Broughton entered into the minute of sale with Alexander, and there appeared no ground from any record to suspect that he was under a restraint or limitation.

The Pursuer pretended, 'that the Nathaniel's general service in '1702, which refers to the Tailzie 1684, ought to have been a 'sufficient interpellation to the creditors.' — But as long as the statute 1685 continues to be the rule, creditors cannot be found to be interpellated by general retours, did they contain ever so express a
reference

ference to the Tailzie. The only two interpellations which the law admits of, is the Sasine of the heir in possession, and the Register of Tailzies ; and even one of these is not sufficient without the other, as has been already proved: So it must appear very extraordinary to maintain, that creditors are to be forfeited of their debts on pretence of a Tailzie that did not appear in either of them.

2dly, The reference made in the general service 1702, could have had no effect, tho' it had been insert in the heir's Sasine. The reference is as follows, *Quod Nathaniel Gordon de Gordonston, est legitimus et propinquior heres Tallie et provisionis, dict. quondam Jacobi Gordon de Carleton, secundum jus Tallie per illum concess. de data 15. die mensis Aprilis, et 13. die mensis Maii, 1684, et 4. die Maii, 1688, per quod dict. Jacobus Gordon, pro causis inibi specificat. cum et sub oneribus, reservationibus, provisionibus, conditionibus, qualificationibus, et restrictionibus, inibi mentionat. dedit, concessit et disposuit, &c.* This reference is clearly not in terms of the statute, and would not have availed though it had been insert in a sasine. The statute requires, that the irritant and resolute clauses should be insert, whereas this reference does not so much as show that the Tailzie contained any irritant or resolute clause. Such general reference was insert in the Viscount of Garnock's sasine; but your Lordships found, *that the general reference in the sasine is not sufficient to interpell creditors, according to the act 1685*, and will always find so in every like case; so this retour ought not to have been mentioned as an interpellation to creditors.

July 28.
1715.
Viscount of
Garnock
contra heirs
of intail.

The Pursuer did also refer to the case of the estate of Westshiels, 'where the limitations in a personal Tailzie, were found 'effectual against the creditors of Sir Robert Denholm, tho' the 'Tailzie was neither registered nor completed by infestment.' But the ground of that decision has been already mentioned; Sir Robert Denholm had no title whatever to the lands, but this personal Tailzie; he was noways apparent heir to Sir William the Tailzier;

Tailzier ; the estate was destined to two heirs-portioners, of which Sir Robert's mother was one, and was then alive ; had Sir Robert been apparent-heir of the investiture, the creditors might have trusted him upon his apparency, as was found both by this Court and the House of Lords in the case of the creditors of Sir George M'Kenzie, the apparent heir of Sir Kenneth M'Kenzie of Cromarty, whose diligences were found to affect the estate, tho' the irritancies were duly insert in his father Sir Kenneth's infestment, in respect the Tailzie had not been recorded.

July 17.
1740.
affirmed in
an appeal,
June 1740-1.

Or had Sir Robert been possessed of any other unlimited title, as Nathaniel Gordon was in this case, it still less could have been pleaded, that a personal Tailzie, which appeared from no record, could affect creditors who contracted upon the faith of such unlimited title. — But as Sir Robert had no sort of title, either real or personal, or apparency, but singly the title made by Sir William Denholm, which deprived him of any power to burden the lands, and reduced him in effect to the state of a liferenter, the decree, which even in that case was given here in favour of the creditors, was altered in the last resort. It is evident this judgment cannot apply to any case where there is a separate title in the person of the debtor that is subject to no limitation.

And with respect to the last part of the argument, upon which the Pursuer seemed to lay some stress, *viz.* ‘ That no infestment had been taken upon this separate right in the person of Nathaniel Gordon, or his son Alexander ; and therefore, the late Mr. Murray of Broughton could not be said to purchase from Alexander upon the faith of the records, as he saw no infestment in his person or his father's : he acquired only upon the faith of a personal right, and must be liable to all personal objections against his authors, and particularly, that they were bound by the Tailzie to extinguish this adjudication.’ — It has been already observed, that there is no obligation laid on the heirs by this Tailzie to redeem or extinguish any adjudication led for the Tailzier's debts ; and if such obligation were supposed, it could not apply to an adjudication which had expired in the person of the

stranger creditor long before it was conveyed to the heir of Tailzie: that adjudication having once become an irredeemable right of property in the person of the adjudger, was transmissible by him to any singular successor, and, if liable to no objection, behoved to evict the lands from all the heirs of Tailzie, in favour of the adjudger in feft, and those who derived right from him.

Nor could it be of any moment in such case, Whether in feftment was taken by the party to whom the adjudger had disposed the lands or not. If the irredeemable right was vested in Dreghorn, if he has divested the *hereditas jacens* of James Gordon of the property of the lands, that property must be transmitted to any person to whom he conveys it, independent of any claim of James Gordon, or his heirs, whether of Tailzie, or any other. If the lands had been disposed by Dreghorn to A. by A. to B. and by B. to C. tho' no in feftment was taken till they came into C's person; yet the full property is vested in him, and no objection can lye against C's right from any personal obligation which A. or B. the intermediate authors, could have come under with respect to the lands. It is equally undeniable, that C. purchases upon the faith of the Records, as that A. did; he saw the property once fully vested in A's author; and he knew that that property must be transmissible by personal conveyances through ever so many hands, without being impeached by any latent obligation, which any of the intermediate disponees might have come under, either to their authors, or to third parties.

The Pursuer, in this argument, is endeavouring to re-establish an error, which has been long ago exploded, and which, if it were to be admitted, would put an end to all certainty in the transmission of land-rights. Every one knows that they are transmitted every day from one to another, by dispositions without in feftment; and, after they have been carried on, through many hands, by such successive progress of personal rights; at last, a purchaser or creditor makes up a complete title by in feftment. If private

vate deeds granted by any of the intermediate authors, should be effectual against the purchaser who had acquired the property of the lands, no purchaser could ever be secure, as it is impossible for him to know, Whether such private deeds or obligations may not have been granted by some one or other of his intermediate authors. There is no record by which such deeds can be known: So the consequence of the Pursuer's doctrine would be, to put all such lands, which have once past through different hands by personal conveyances, altogether *extra commercium*, and to render the boasted certainty of our land-rights, and the security of the records as to such lands, of no effect whatsoever.

It is unnecessary to enlarge upon the absurd consequences that would follow from this doctrine, as your Lordships had them fully under your view not many years ago, and did with great solemnity settle this point upon so solid a foundation, as has never since that time been attempted to be shaken or called in question.

The case referred to, was betwixt William Bell of Blackwood-house, and John Gartshore merchant in Glasgow, who competed anent the right of a tenement in Kelso, which had been purchased at a judicial sale by Alexander Oliphant; and he, without infesting, disposed the same to William Chatto. William Chatto granted a disposition in 1732 to Blackwood-house, and John Gartshore afterwards adjudged from Chatto in 1734, and was infest. Blackwood-house insisted, that, by his disposition, Chatto was denuded of the personal right, which was all that was in him, and that it ought to prevail against Gartshore's subsequent Adjudication and Infestment; but your Lordships overruled his plea in the most solemn manner, after a hearing in presence, and Informations; and were so clear in it, that an elaborate Petition offered for Blackwood-house, against the Interlocutor, was refused without Answers.

As long as the law so stands; and it has not been doubted of since that time; it will not be possible to overturn the right of a purchaser or creditor, upon any private obligation which might have

June 27.
1737.
Bell *contra*
Gartshore,
Dict. vol. 1.
p. 183.

have been granted by his author, who conveyed the lands when he had only a personal title. Had Nathaniel Gordon granted an obligation to convey Dreghorn's Adjudication to the heirs of Tailzie, which is much stronger than the Pursuer can figure the case, let him construct the Tailzie as he will; yet such obligation could have no effect against his creditors or singular successors denuding him of the right he had to the lands by Adjudication and Infestment; else there would be an end at once of all the security of our real rights and records, the most boasted and envied part of the law of this country.

Your Lordships have already heard, that the deceased Alexander Murray of Broughton did, in the year 1746, expedite a Charter and Infestment under the Great Seal, upon the Adjudication which he had led in 1735, in implement of his minute, and in payment of his debts. But, supposing no such Infestment had been expedite, the creditors are advised, that the Adjudication itself would be sufficient to secure them against the effect of a latent Tailzie. Where the competition is between two onerous rights, the first Infestment determines the preference, as both are *in pari casu*; both are *in damno vitando*. But, when the legislature condescended to indulge the humour of the nation in establishing perpetuities by intails, it never intended that they should be made a handle to surprize creditors, by starting out of their lurking places, and all at once appearing upon record, while the creditors were going on in course of their diligence. While an intail is kept latent, without infestment or registration, creditors are *in bona fide* to contract with an heir, who has a separate title upon which his right to the lands may be defended, and will be secure if they are going on in diligence, altho' it should not be fully completed before infestment or registration of the Tailzie.

So it is provided most expressly by the statute, which declares, *That such Tailzies shall only be allowed*, in which the irritant clauses are insert in the Sasines, and in the Record. And it is only,

ly, upon *being so insert*, that the statute declares them *to be real and effectual* against creditors, comprisers, adjudgers, and singular successors. It is plain that, until they are so insert, the clauses have no more effect against creditors, or singular successors, than if they were not contained in the Tailzie. The heirs of Tailzie cannot object to the creditors that they are not infest upon their Adjudications. Their Adjudications are equally good against them, as if they were completed by infestment; because the statute has declared, that until the Tailzie is completed as there directed, it shall have no effect against creditors adjudging.

And therefore Mr. Murray's right in competition with this latent Tailzie, is fully supported upon two grounds; *1mo*, That his Adjudication being completed by charter and infestment, it established in him a full right of property to the lands, upon Dreghorn's Charter of Adjudication, now 70 years old, which would compete even with an onerous title upon which no infestment had been taken. *2do*, That, even laying aside the charter and infestment, the Adjudication itself was sufficient to give a title to the property of the lands established in Dreghorn, by the charter 1693, in opposition to this latent Tailzie, which, by the express proviso in the statute, could have no effect against adjudging creditors until it appeared upon record.

OBJECTI-
ON III.

' That it does not appear, that Mr. Murray of Broughton did
' not contract with Nathaniel or Alexander Gordons upon the
' faith of the Adjudications and infestment 1693, to which they
' had right, nor that he meant to insist either upon these Adjudica-
' tions, or upon the Minute of Sale 1728: But on the contrary,
' after leading the Adjudication, both upon the minute and for
' payment of his debts, he brought a Process of Ranking and Sale,
' by which he must be understood to have passed from any right
' of the lands he had by the Minute, and from these expired diligen-
' ces, and to have agreed that the estate should be sold for payment
' of the debts, in so far as the debtors had power to contract; and
' in all the debate betwixt the heir and the creditors, which was
G ' terminated

‘ terminated by the above Interlocutor 1753, no mention is made
 ‘ of these expired Adjudications and Infestment 1693; which if
 ‘ it had been, Nathaniel’s title to the estate gave him an unlimited
 ‘ right of property, and was at once sufficient for Broughton and the
 ‘ creditors *ad victoriam cause*. This is real evidence that Broughton
 ‘ knew nothing of this absolute right which is now endeavoured to
 ‘ be set up in the person of Nathaniel.’

ANSWER

But this Objection is founded chiefly upon a mistake in fact; for Alexander Murray of Broughton, who entered into the Minute of Sale with Alexander Gordon, anent a part of the estate, in 1728, and became creditor to him in further considerable debts; upon all which he adjudged the estate in 1735, and expedite a Charter and Infestment in 1746, had deceased before the competition was carried on betwixt the heir and the creditors in 1752 and 1753; and his son James Murray, now of Broughton, who succeeded to him, knew nothing of these Adjudications and Infestments, upon the faith of which his father had contracted; and it surely cannot be imputed to him that he did not found upon titles in the person of his father’s author, of which he was ignorant: Had he even been ignorant of the nature of the transaction made by his father in his infancy, this could not hurt him, far less can it prejudice him that he did not know the titles that had been made up to the lands, and conveyed to his author a great many years before he was born.

This cannot preclude him now, when he is come to the knowledge of these titles, to found upon them, as his father would have done if he had lived; there is no reason to doubt that his father knew of the unlimited titles in Alexander Gordon’s person; else, why would he have entered into a Minute of Sale with him, as absolute proprietor of the estate, or lent him such large sums of money, if he had imagined he was fettered by a Tailzie? And all his after-conduct gives further evidence on this point: When he could not obtain either payment of his debts or performance of the Minute of Sale; he led an Adjudication for implement of the one, and payment of the other, upon which he expedite a Charter and Infestment

Infestment, and thereafter brought a Process of Ranking and Sale: These steps of diligence cannot be construed a passing from the Minute of Sale; on the contrary, they were the only legal means he could use to obtain implement of it, or damages, in case it was not implemented: The only method by which he could compell either the one or the other was by Adjudication and Infestment, upon which he would have entered into possession of the lands if his debtor had been owing no other debts; but as he was involved in a variety of other debts, beyond the value of the estate, it was necessary to bring a Process of Ranking and Sale, by which he might recover what was due to him in concurrence with other creditors, as far as the debtor's estate could afford it.

And it is surely absurd to plead, that Broughton, by raising a Process of Ranking and Sale, could mean to pass from the expired Adjudications that were in his debtor's person: These had become irredeemable titles of property, forty years before that process was raised; and they were the true foundation upon which the process was built, as the creditors were thereby entitled to sell the lands, of which their debtor was unlimited proprietor, for payment of their debts.

‘ That Broughton was a party in the process 1753, and concurred with the other creditors in objecting to the Tailzie, that it had not been recorded in terms of the act 1685; That this objection was repelled by the above Interlocutor of the 21st November, 1753; and it was found that the heir in possession might lawfully contract debts, to the extent of the half of the value of the estate, and consequently, as to the other half, the Tailzie was found effectual against the creditors; That this is a *res judicata* upon the point, confirmed by two consecutive Interlocutors, and cannot now be altered.’

OBJECTI-
ON IV.

It is answered, that these Interlocutors were given in the Process of Ranking and Sale, upon the comparance first of Alexander Gordon the apparent heir, who founded on the Tailzie, and thereafter of William Gordon Writer to the Signet his uncle. The creditors objected

ANSWER.

jected that it was not recorded; and the heir answered, that it was signed by the Tailzier before the date of the statute. The creditors replied, that tho' it was signed by the Tailzier in 1684, yet the witnesses did not sign till the year 1688, and therefore it was not completely executed till after the statute: The Court pronounced the above Interlocutor; but *no extract* has ever proceeded upon it.

It is obvious, that this Interlocutor, pronounced in a different process, can be no *res judicata* in the present case. This is a process of a quite different nature, brought by Sir Thomas Gordon, to declare an irritancy against his nephew Alexander Gordon, who was the creditors party in that former process. Mr. Murray here defends his right upon quite different titles, *viz.* The expired Adjudications and infestment, conveyed to Nathaniel and Alexander Gordons, with whom his father contracted, and from whom he purchased. These titles were not once founded on in the Process of Ranking and Sale; and as they establish an unlimited property in the person of Nathaniel and Alexander Gordons, it is evidently of no moment, whether the Tailzie is supposed to have been executed before or after the act 1685. That point was solemnly determined by your Lordships, and affirmed by the House of Lords, in the late case of the creditors of Rothes, that a Tailzie, whether executed before or after the act, can have no effect against creditors, if it is not recorded; and thereupon the creditors of the heir of Tailzie, have recovered their debts out of the estate, tho' the irritant clauses were ingrossed in his titles; much less can it be doubted, that an unrecorded Tailzie can have no effect against the creditors of an heir, who was possessed of titles of property that were clogged by no limitation, as in the present case. Had these titles been founded on in the Process of Ranking, there is no doubt, your Lordships would have given the same judgment: And the interlocutor there given, upon an imperfect view of the case, cannot preclude your Lordships in this new process, at the instance of a different party, to give the judgment as the law directs, now
when

when the necessary titles, on which the question falls to be tried, are fully laid before you.

‘ That, alongſt with the Proceſs of Ranking and Sale, raiſed by Mr. Murray of Broughton, a Proceſs of Improbation was alſo raiſed, in which a Decreet of Certification was afterwards extracted; and, as the adjudications now founded on, with the charter and infeſtment 1693, were not produced in that improbation, they are cut off by the Certification.’

OBJECTI-
ON V.

But the answer is obvious: The end of a Proceſs of Improbation, brought by creditors alongſt with the Ranking, is to exclude all other debts and deeds of the debtor that may interfere with them in recovering payment; but by no means to exclude the titles in their debtor’s perſon, which are ſo far from hurting them, that, on the contrary, they are abſolutely unneceſſary to their attaining the end of their action, which is the recovering of payment of their juſt debts out of the price of his eſtate.

ANSWER.

‘ That Mr. Murray of Broughton is inſiſting in this claim, not for his own behoof, but for behoof of Alexander Gordon the apparent heir of Tailzie, who has acquired his predeceſſor’s debts, at eaſy rates, after the Tailzie was ſuſtained by the Interlocutor 1753, and is now endeavouring to extend them to the full amount, in order to diſappoint the action brought at the inſtance of Sir Thomas Gordon the Purſuer.’

OBJECTI-
ON VI.

The fact is denied, that Mr. Murray is under any obligation of truſt to the ſaid Alexander Gordon; and therefore it is unneceſſary to argue upon the conſequences. At the ſame time, if it were ſuppoſed that Alexander Gordon had acquired any of the creditors debts, it does not appear what objection could ariſe to the Purſuer upon that ground, as nothing is to hinder the debts to ſubſiſt in his perſon, as well as any other; and it could not but be thought more equitable, that the eſtate ſhould be held by the creditors or their aſſignee, than that it ſhould be carried off by the Purſuer, to the forfeiture both of the creditors and of the apparent heir, who was preferable in the ſucceſſion, both by the rules of law and by the

ANSWER.

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will

will of the Tailzier, and who has been guilty of no fault that can deserve any punishment.

And therefore, upon the whole, as the debts due to Mr. Murray and the other creditors, far exceed the value of the estate; as their debtors Nathaniel and Alexander Gordon had in their person an irredeemable title of property, to which no objection can be made, with other adjudications for debts equal to the value of the lands, it is hoped, that these titles will not be overturned upon a latent Tailzie, which appeared in no record, in order to give the benefit of a penal irritancy to a remoter heir, to the exclusion of the descendants of the nearest; but that the diligence of the creditors will be found effectual to exclude this action, in terms of the Lord Ordinary's Interlocutor.

In respect whereof, &c.

J. A. FERGUSON.

